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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

RICHARD REYNALDO GARCIA,

Petitioner

V.

THE STATE OF NEW MEXICO

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of New Mexico

RESPONDENT'S BRIEF IN OPPOSITION

PAUL BARDACKE
Attorney General of New Mexico

MARCIA E. WHITE
Assistant Attorney General
Director, Appeals Division

ANTHONY TUPLER
Assistant Attorney General

Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6000

ATTORNEYS FOR RESPONDENT

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QUESTIONS FOR REVIEW

Are New Mexico's Uniform Jury Instructions for capital sentencing proceedings unconstitutional in that:

1. the instructions provide insufficient guidance about the relationship between aggravating and mitigating circumstances and the burden of proof thereon; and

2. the instructions, by permitting unrestricted consideration of "the defendant and the crime," do not sufficiently channel discretion according to clear and objective standards?

PRELIMINARY STATEMENT

The Respondent State of New Mexico pursuant to Rule 34.2, does not deem a statement of the case nor the noted exceptions in the foregoing rule necessary for inclusion in this Brief in Opposition. Petitioner adequately sets out those matters required by Rule 34.1.

SUMMARY OF ARGUMENT

Petitioner Garcia presents two questions for review by this Court. The first question does not warrant review by this Court for it lacks significant constitutional importance. Additionally, the prior decisions of this Court have adequately addressed the issue presented in the first question. There is no conflict in the cases relied upon by petitioner.

The second question does not merit further review by this Court for its lack of substantial constitutional import. The New Mexico Supreme Court relied upon the prior decisions of this Court which have adequately addressed the second question presented. Finally, the second question was not raised in the trial court and does not have an adequate trial court record to afford full development or treatment of the question now presented.

ARGUMENT

Petitioner Garcia presents two issues for the Court's consideration. First, whether the jury instructions in this case provided sufficient guidance regarding the relationship between aggravating and mitigating circumstances and the burden of proof thereon. Secondly, whether the instructions sufficiently channeled discretion by permitting unrestricted consideration of "the defendant and the crime"? (Petition, Questions for Review, 6).

Respondent State of New Mexico, believes that neither question warrants review by this Court. Both questions have been adequately addressed by this Court's previous decisions and do not justify further review. Rule 17, Supreme Court Rules.

The first portion of the first issue queries whether the jury instructions in this case provide sufficient guidance about the relationship between aggravating and mitigating circumstances. This does not involve a question of constitutional significance. As a matter of basic logic, any capital jury is called upon to consider, balance, and weigh various circumstances in aggravation or in mitigation. The instructions contested here set out the inherent competition between the two forms of circumstances that the jury must resolve in deciding the weighty question of life or death. (R.P. 180-2, 187). The Court recognized this in Profitt v. Florida, 428 U.S. 242, 257 (1976). The only conceivable relationship between aggravating and mitigating circumstances is that they must be balanced against each other and a decision rendered from that judgmental process. There is no requirement for this Court to state such a principle as a matter of constitutional law.

The second element of the first question involves the burden of proof between aggravating and mitigating circumstances. This question likewise

does not require the attention of this Court. Petitioner suggests a conflict between Harris v. Pulley, 692 F.2d 1189, (9th Cir. 1982) and Ford v. Strickland, 696, F.2d 804 (11 Cir. 1983) with State v. Wood, 648 P.2d 71, 83 (Utah, 1982) (Pet. 6). There is not a conflict.

Ford and Harris rejected habeas claims that state sentencing processes were unconstitutional to the extent that they did not require aggravating circumstances to outweight mitigating circumstances beyond a reasonable doubt.

In State v. Wood, supra, the Utah Supreme Court dealt with a statute which contained no burden of proof to either the existence of an aggravating circumstance or the balance of proof between aggravating and mitigating circumstances. Of particular concern to the Wood court was a statute which not only failed to assign any weight to find the existence of an aggravating factor but even omitted directions to the jury to compare aggravating and mitigating factors. As the Wood court noted, "The sentencing authority is simply directed by Section 76-3-2072 "to 'consider the penalty'." 648 P.2d at 79. Finally, the holding in State v. Wood, supra, was premised solely on statutory constrution grounds. Wood explicitly declined to assign either state or federal constitutional grounds as a basis for its holding. (The disagreement, if any, suggested by Petitioner between the cited cases does not raise a substantial, federal constitutional issue.)

The New Mexico Statute requires proof beyond a reasonable doubt of the aggravating circumstances before the jury even reaches any balancing test. (31-20A-2 and 3, N.M.S.A., 1978 Pet. App. 29). Thus, Wood is inapplicable to this question.

There is no substantive issue presented which requires or justifies review by the Court on either part of the first question. Rule 17, Supreme Court Rules.

The second question presented by Petitioner is also of insufficient import to merit review by this Court. The arguments by Petitioner overlook the inherent subjectivity that is essential to considering, finding and weighing mitigating circumstances.

The prior decisions of this Court provide the answer Petitioner asserts is needed in his case. This Court has yet to hold that the instructions to a capital jury must remove all measure of discretion. Indeed, given the subjective, unlimited nature of mitigating circumstances mandated by this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), the instructions must necessarily allow the jury some discretionary latitude in order to fully consider the mitigating circumstances.

The New Mexico Supreme Court's decision recognized this Court's requirement that individual consideration is inherently subjective and must be so to afford a capital defendant a constitutionally adequate penalty hearing. (Petition Appendix, Section B, 144). Both the decisions of this Court and the New Mexico Supreme Court have answered the question presented here and thus, there is no reason for this Court to further review the same ground. Lockett v. Ohio, supra; State v. Garcia, Pet. App. Section B.

Finally, the issue presented by the second question was raised for the first time on appeal. Petitioner has not demonstrated that the complained-of instruction was prejudicial to his case, that there was any evidence of an aggravating nature within the context of "considering both the defendant and the crime" or that the jury decision was based upon any such evidence. The speculative nature of the second question portends, at best, an academic analysis of the instruction now challenged in this Court. Absent an appropriate trial court record, there is no substantial matter for this Court to review.

CONCLUSION

For the reasons presented, the Respondent State of New Mexico respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

PAUL BARDACKE
Attorney General of New Mexico

Marcia E. White

MARCIA E. WHITE
Assistant Attorney General

Anthony Tupler

ANTHONY TUPLER
Assistant Attorney General

Attorneys for Respondent State of
New Mexico
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6929